No. 293

In the Supreme Court of the United States

OCTOBER TERM, 1949

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT J. RABINOWITZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit reversing respondent's conviction on two counts of an indictment charging him with selling altered postage stamps, in violation of Section 154 of the Criminal Code, 18 U.S.C. (1940 ed.) 268, and with possessing and concealing altered postage stamps, in violation of Section 151 of the Criminal Code, 18 U.S.C. (1940 ed.) 265.

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 225-230) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1949 (R. 231). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether, upon respondent's arrest under a lawful warrant for selling altered postage stamps, it was lawful for the arresting officers to search his one-room business office without a search warrant and seize other altered postage stamps, later used on trial for his conviction.

STATUTE INVOLVED

Criminal Code, Section 147, as amended, 18 U.S.C. (1940 ed.) 261:

> The words "obligation or other security of the United States" shall be held to mean all bonds, certificates of indebtedness, national bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which have been or may be issued under any Act of Congress, and canceled United States stamps.

Criminal Code, Section 151, 18 U.S.C. (1940 ed.) 265:

> Whoever, with intent to defraud, shall pass, utter, publish, or sell, or attempt to pass, utter,

publish, or sell, or shall bring into the United States or any place subject to the jurisdiction thereof, with intent to pass, publish, utter, or sell, or shall keep in possession or conceal with like intent, any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 and imprisoned not more than fifteen years.

Criminal Code, Section 154, 18 U.S.C. (1940 ed.) 268:

Whoever shall buy, sell, exchange, transfer, receive, or deliver any false, forged, counterfeited, or altered obligation or other security of the United States, or circulating note of any banking association organized or acting under the laws thereof, which has been or may hereafter be issued by virtue of any Act of Congress, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

STATEMENT

Respondent was convicted on two counts of an indictment, the first for selling four altered postage stamps, in violation of Section 154 of the Criminal Code (R. 2-3), and the second for possessing and concealing 573 altered postage stamps, in violation of Section 151 of the Criminal Code (R. 3-6). He was sentenced to imprisonment for one year and one day on each count, but execution of the sentence on the second count was suspended, and in addition

he was fined $1,000 on the second count (R. 216, 217-218). The conviction on both counts was reversed by the Court of Appeals, one judge dissenting, on the ground that there was an unlawful search and seizure of the 573 stamps, the possession of which was the crime charged in the second count. The relevant facts are set forth at pp. 5-6, *infra*.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the search and seizure of the 573 altered stamps at respondent's business office were unlawful under the Fourth Amendment.

2. In holding that the search was not a lawful incident to the arrest of respondent under a lawful warrant of arrest.

3. In reversing respondent's conviction.

REASONS FOR GRANTING THE WRIT

The majority below said (R. 228):

> If it were not for the decision of the Supreme Court in *Trupiano* v. *United States* [334 U.S. 699] and if *Harris* v. *United States* [331 U.S. 145] were its last utterance, we should have unhesitatingly held the seizure valid. * * * Hence the legality of the search must turn upon how far *Trupiano* v. *United States, supra,* has modified the earlier decision. As we read the opinion of the majority, it meant to hold generally that, whenever officers can safely get a search warrant, they must do so; and that it is only on occasions when the

> evidence is likely to escape, that they may couple a general search without warrant with a lawful arrest. * * *

The majority below thought that "In the case at bar there was no excuse for not getting a search warrant" (R. 229) and accordingly reversed the conviction and remanded the cause for dismissal of the second count and for further proceedings in respect of the first count in accordance with the opinion (*ibid.*). We think the dissenting judge was right in his view that this case is controlled by *Harris* v. *United States,* and that reversal here requires "what the Supreme Court has so far carefully refrained from doing, namely, * * * overrule" the *Harris* decision (R. 229).

In the instant case, respondent's confederate, Abraham Kalish, confessed on February 1, 1943 (R. 129-130), that he had forged overprints on a number of postage stamps for respondent from 1939 to 1942 (R. 88). On February 6, 1943, a post office employee purchased from respondent the four altered stamps involved in the first count of the indictment (R. 14, 18). After a stamp expert on February 9, 1943 (R. 72), reported that these stamps had been altered, a postal inspector on February 16, 1943, obtained a warrant for respondent's arrest (R. 59, 73, 74) on a complaint charging that the sale was illegal under Section 154 of the Criminal Code (R. 14-15). At about 8:45 p.m. on February 16, respondent was arrested at his one-room office where he was engaged in business as a

stamp dealer (R. 18-19). During the search of the office, which lasted not more than an hour and a half (R. 76), the government agents took a number of stamps, check books, and check stubs, some of the objects being taken from drawers, closets and files (R. 76, 77). Part of the stamps so taken were the basis of the second count.

Points of similarity between the *Harris* case, *supra*, and the instant case are readily apparent. In both cases government agents entered the premises legally with valid warrants of arrest (331 U. S. at 148; R. 59, 73, 74). Just as keeping the draft cards in his custody was a continuing offense committed in the presence of the searching officers in the *Harris* case (331 U. S. at 151), so also was respondent's possession of the altered stamps under Section 151 of the Criminal Code. Purely documentary materials were involved in both searches. As the search in the *Harris* case was necessarily intensive in view of the agents' prior knowledge of evidence connecting Harris with the theft of two canceled checks from the Mudge Oil Company and the objects of their search (331 U. S. at 152), so a similar type of search was necessary here to discover whether, as the agents had reason to believe, respondent had additional altered stamps in his possession.

Indeed, as the majority below recognized (R. 228), the circumstances were more aggravated in the *Harris* case than in the instant case. The *Harris* case involved a search of a four-room apart-

ment (331 U. S. at 152) in contrast to the one-room office of respondent (R. 19). In that case, a man's private dwelling was searched, while in the instant case it was a place of business.[1] The search in the *Harris* case required five hours (331 U. S. at 149), as compared with the one hour and a half search in the instant case. (R. 76.) And although in the *Harris* case the draft cards were not related to the crimes for which Harris was arrested (331 U. S. at 154), there was a close relationship between the seized stamps and the crime for which respondent in the instant case was arrested (R. 212).

In contrast with the analogous features of the *Harris* case and the instant case, there are important differences between the *Trupiano* case, *supra*, and the instant case. Thus, the officers had no warrant for arrest in the *Trupiano* case (334 U. S. at 703) as they did here (R. 59, 73, 74). In that case the agents knew "every detail of the construction and operation of the illegal distillery" weeks before the raid and had access to "information which could easily have formed the basis for a detailed and effective search warrant" (334 U. S. at 706). In the instant case, on the other hand, the agents knew only that respondent had sold four altered stamps ten days previously and that Kalish had stated that he had overprinted stamps for respondent over a long period. In the light of such infor-

[1] Stricter requirements of reasonableness may apply when a dwelling is being searched. *Harris* v. *United States*, 331 U. S. 145, 151; *Davis* v. *United States*, 328 U. S. 582, 593; *Matthews* v. *Correa*, 135 F. 2d 534, 537 (C.A. 2).

mation the agents could and obviously did believe that respondent was dealing in spurious stamps, but it is doubtful that the evidence they had would have furnished a sufficient basis for the issuance of a search warrant. See *In re 191 Front Street*, 5 F. 2d 282, 285 (C.A. 2); cf. *Harris* v. *United States*, 331 U. S. at 153.[2] In the *Trupiano* case the property was bulky and not of a type that could have been dismantled and removed before procurement of a warrant (334 U. S. 706), but in the instant case the stamps could easily have been removed the very moment respondent suspected the authorities were after him.

This Court in the *Trupiano* case distinguished the earlier *Harris* case on the basis that "The instant case relates only to the seizure of contraband the existence and precise nature and location of which the law enforcement officers were aware long before making the lawful arrest," a circumstance which the Court said "was wholly lacking in the *Harris* case" (334 U. S. at 708-709), and which we submit was equally lacking here. And the Court left "it to another day to test the *Harris* situation by the rule that search warrants are to be obtained and used wherever reasonably practicable" (334 U. S. at 709). In view of this state of the law in this Court and the refusal of the court below to follow the *Harris* decision because of its under-

[2] Under 18 U.S.C. (1940 ed.) 613, then in effect, it was required that a warrant "particularly" describe the property sought. See Rule 41(c), F. R. Crim. P.

standing of the impact of the *Trupiano* decision, the instant case manifestly presents an important question which can only be resolved by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1949.

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Brief for the U.S.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 225-230) are reported at 176 F. 2d 732. The oral opinion of the District Court denying respondent's motion to suppress evidence on the ground of an alleged illegal search and seizure (R. 206-213) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1949 (R. 231). The petition for a writ of certiorari was filed on August 26, 1949, and

was granted on November 21, 1949 (R. 233). The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether, upon respondent's arrest under a lawful warrant for selling altered postage stamps, it was lawful for the arresting officers to search his one-room business office without a search warrant and seize other altered postage stamps, later used on trial for his conviction.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourth Amendment to the Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Criminal Code, Section 147, as amended, 18 U.S.C. (1940 ed.) 261:

> The words "obligation or other security of the United States" shall be held to mean all bonds, certificates of indebtedness, national bank currency, coupons, United States notes, treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of

whatever denomination, which have been or may be issued under any Act of Congress, and canceled United States stamps.

Criminal Code, Section 151, 18 U.S.C. (1940 ed.) 265:

> Whoever, with intent to defraud, shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or shall bring into the United States or any place subject to the jurisdiction thereof, with intent to pass, publish, utter, or sell, or shall keep in possession or conceal with like intent, any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 and imprisoned not more than fifteen years.

Criminal Code, Section 154, 18 U.S.C. (1940 ed.) 268:

> Whoever shall buy, sell, exchange, transfer, receive, or deliver any false, forged, counterfeited, or altered obligation or other security of the United States, or circulating note of any banking association organized or acting under the laws thereof, which has been or may hereafter be issued by virtue of any Act of Congress, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

STATEMENT

Respondent was convicted in the District Court for the Southern District of New York on two

counts of an indictment, the first for selling four altered postage stamps, in violation of Section 154 of the Criminal Code, *supra,* p. 3 (R. 2-3) and the second for possessing and concealing 573 altered postage stamps, in violation of Section 151 of the Criminal Code, *supra,* p. 3 (R. 3-6). He was sentenced to imprisonment for one year and one day on each count, but execution of the sentence on the second count was suspended, and, in addition, he was fined $1,000 on the second count (R. 216, 217-218).

The Government introduced in evidence at the trial the four altered postage stamps (R. 52-53), on the sale of which his conviction on count 1 was based, and also numerous other altered stamps (R. 60, 61, 67, 133-134, 149-150, 152, 154), on the possession and concealment of which his conviction on count 2 was based. The only question here involved is whether these latter stamps were obtained as the result of an illegal search and seizure. Prior to the trial, respondent moved for their return and suppression as evidence (R. 10-13). The motion was denied (R. 20-21). It was renewed several times during the trial (R. 23-34, 60, 67, 180-181, 189, 206), but was again denied (R. 206-208). On appeal, however, the Court of Appeals for the Second Circuit, one judge dissenting, held that the search and seizure were unlawful. The judgment of conviction on both counts was reversed, the second count was ordered dismissed, and the first

count was remanded for further proceedings (R. 225-231).

The facts relating to the search and seizure, which are substantially undisputed, appear in petitioner's motion to suppress (R. 10-13), in the affidavit in opposition to the motion (R. 17-19), and in the testimony at the trial (R. 57-61, 69-82, 157-158). The evidence relating thereto may be summarized as follows:

Respondent's confederate, Abraham Kalish, was arrested on February 1, 1943, on a charge of participating in forgeries of canceled United States stamps (R. 102). He confessed the same day and implicated respondent in a scheme to defraud stamp collectors by selling them stamps on which "overprints" had been forged. Overprinted stamps, that is, stamps on which the Post Office Department had printed legends such as "Nebr." and "Kans." prior to issue, had a scarcity value to stamp collectors. Kalish, a printer, confessed that respondent had engaged him to print overprints on canceled stamps. Post Office Inspector Flanagan then arranged for another Post Office employee, Benjamin Skulnick, to go to respondent's place of business and purchase stamps bearing overprints. He supplied Skulnick with a list of about 20 issues of such stamps and instructed him to purchase as many of each of the issues as respondent offered for sale (R. 69-70). On February 6, 1943, Skulnick bought from respondent

four canceled stamps bearing overprints and paid him $1.72. He delivered these stamps the same day to Flanagan (R. 48, 51, 55), who in turn submitted them to a philatelic expert for examination as to the authenticity of the overprints (R. 58). The expert reported on February 9, 1943, that the overprints were forgeries (R. 58, 72).

On February 16, 1943, Flanagan obtained from a United States commissioner a warrant for respondent's arrest upon an affidavit (R. 14-15) in which he charged that on February 6, 1943, respondent had sold Skulnick four altered stamps bearing forged overprints, in violation of 18 U. S. C. (1940 ed.) 268 (R. 59, 73, 74). The warrant was not introduced in evidence and does not appear in the record. Flanagan testified that although the warrant was issued primarily on the charge that respondent had sold four altered stamps, "there was other information in my possession that was included in that warrant for arrest" (R. 74).

Armed with the warrant of arrest, and accompanied by an Assistant United States Attorney, an agent of the United States Secret Service, a special agent of the Intelligence Unit of the Treasury Department, the philatelic expert who had examined the four altered stamps which Skulnick had purchased from respondent and the expert's assistant, Flanagan went to respondent's place of business on February 16, 1943, at about 8:30 p.m.

The place in which respondent carried on his business was a one-room sales office, open to the public, at Room 208, 276 West 43rd Street in New York City. Respondent, who was in the office with another person, was placed under arrest, and he was "requested to stand aside while a search of his office was made." (R. 19.) The search was instituted over his objection (R. 75). Flanagan testified that the agents "looked into everything that was accessible", including filing cabinets, drawers and closets, which, when opened by the agents, disclosed stamps. He stated that "We inspected all the stamps that he had available at his place of business at that time" (R. 76-77). The search consumed about an hour or "no more than an hour and a half" (R. 76), during which time the philatelic experts who were in the group inspected the stamps that were placed before them by the agents (R. 158). The search uncovered several thousand postage and other stamps, all of which the agents understood to be "part of his stock for sale to the public." They took these stamps, together with respondent's check book and check stubs, from the premises (R. 77-80). The stamps were photographed and examined by the philatelic expert in his laboratory and a portion of them were thereafter returned to respondent. Five hundred and seventy-three of the stamps so taken were the basis of the second count of the indictment on which respondent was convicted.

SUMMARY OF ARGUMENT

The search and seizure which the court below condemned were more limited in scope than those which were approved by this Court in *Harris* v. *United States*, 331 U. S. 145. Here the search, which, like the one in *Harris*, was incident to a lawful arrest and entry, was confined to a one-room business office, as distinguished from the four-room dwelling in the *Harris* case, and consumed much less time than the search in that case. And here, unlike *Harris*, there was a close relationship between the seized objects and the crime for which respondent was arrested. The court below stated that if it had deemed the *Harris* decision controlling, it would have unhesitatingly held the seizure valid.

The decision below is based on the interpretation that *Trupiano* v. *United States*, 334 U. S. 699, has so far modified the *Harris* decision that the failure of the agents in the instant case to procure a search warrant was fatal, even though the search and seizure were incident to a lawful arrest. Such an interpretation is, in effect, a declaration that the *Harris* decision has been overruled. This Court has not itself overruled *Harris*. We urge the Court to reaffirm the principle that a search warrant is unnecessary to effect a search incident to a lawful arrest, so long as the search is reasonable and is confined within traditional limits. Thus, a general exploratory search for evidence connecting the

accused with some crime, which is what the Fourth Amendment was designed to prevent, would, of course, be proscribed; but if the search is actually and in good faith incident to a lawful arrest, law enforcement officers should not be confined to looking only for those objects about which they have sufficient advance information to procure a search warrant. The right of arresting officers, consequent upon and incident to a lawful arrest, to search the premises on which the arrest takes place for the fruits and instrumentalities of the crime for which the arrest is made, should not be so restricted. An accommodation of the interest in privacy and in efficient law enforcement is assured in upholding searches of the kind involved in this case without requiring additional authorization. To the extent that the *Trupiano* decision may be thought to be inconsistent with the *Harris* case, the former should be explicitly disapproved.

ARGUMENT

I

The Search and Seizure Were Valid as Incidental to a Lawful Arrest

Simply stated, it is our position that the search and seizure in this case should be sustained on the basis of this Court's decision in *Harris* v. *United States*, 331 U. S. 145. Indeed, the activities of the law enforcement officers here were more limited in scope than those which received judicial approval in that case. And, as we shall show under Point

II, *infra*, the *Harris* decision has not been and should not now be overruled.

There is no question, of course, of the validity of respondent's arrest or of the legality of the entry into his office. The warrant of arrest was issued upon an application which disclosed probable cause to believe that respondent had committed a felony. And, putting to one side until we reach Point II an appraisal of the incidence of *Trupiano* v. *United States*, 334 U. S. 699, it can be said with assurance that the right of officers, upon a lawful arrest, to search to some extent the premises where the suspect is arrested, has never been deemed by this Court to be inconsistent with the restrictions of the Fourth Amendment.

Search and seizure incident to lawful arrest is, as the Court noted in *Harris* v. *United States*, *supra*, at 150-151, "a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states." The authorities supporting this conclusion are set forth in the Government's brief (pp. 17-68) and in the opinion in the *Harris* case (No. 34, Oct. Term, 1946); see, particularly, *Agnello* v. *United States*, 269 U. S. 20, 30; *Carroll* v. *United States*, 267 U. S. 132, 158; *Weeks* v. *United States*, 232 U. S. 383, 392. In the *Agnello* case, for example, the Court said:

> The right, without a search warrant contemporaneously to search persons lawfully

> arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.'

The delineation of the precise boundaries of a valid search is difficult for, as this Court pointed out in *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 357, "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." See also *Harris* v. *United States*, 331 U. S. at 150. But analysis of the authorities on the subject indicates that the reasonableness, the permissible extent of a search and seizure incident to a lawful arrest, may generally be said to turn on whether the search is actually and in good faith *incidental* to the arrest, as distinguished from a general exploratory search for evidence of crime. Evidence obtained as the result of the latter type of search is, of course, inadmissible. In *United States* v. *Lefkowitz*, 285 U. S. 452, where the search was condemned because it was "exploratory and general and made solely to find evidence of respondent's guilt of the alleged conspiracy or some other crime", the Court said (p. 465):

> The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime,

> from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the Government, to discover property concealed to avoid payment of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime.

Bearing in mind this distinction, the validity of the search in the instant case should be tested, primarily, by a consideration of two factors: first, the purpose of the search; and, second, its character. And since, in our view, the search was valid, the seizure was also valid because the objects seized were, as we shall show, themselves proper objects of a search.

Although the record in this case does not contain an explicit statement of the objects sought by the officers,[1] the circumstances make it clear that, having ample reason to suspect that respondent's stock in trade contained altered stamps in addition to the four forged overprints which had been sold to the Post Office employee on February 6, 1943, the search was instituted to discover all spurious overprints in his office. Kalish, respondent's accomplice, had previously confessed that he had collaborated with respondent in overprinting a large

[1] The trial judge's findings of fact (R. 206-207) are silent on this point. There was, however, a finding that "the search was made incidental to the arrest" (R. 206).

number of stamps and he had produced the dies which he had used in making the forgeries. Moreover, Kalish apparently informed the officers that his remuneration was contingent upon the sale of those forged stamps (see R. 88). Philatelic experts accompanied the agents to inspect the stamps and to cull those which were sufficiently suspicious to warrant further examination to establish their spurious nature.

The warrant of arrest was issued on the basis of a complaint (R. 14-15) which charged the sale, in violation of Section 154 of the Criminal Code, of the four stamps which had been purchased by Skulnick, the Post Office employee. The warrant itself was not introduced in evidence at the trial. But since Flanagan, the Post Office inspector, testified that "there was other information in my possession that was included in that warrant for arrest" (R. 74), the warrant conceivably may not have been limited to a charge of violation of Section 154 (selling altered stamps with the intent that they be passed or used as genuine), but may have been sufficiently general to include a charge of violation of Section 151 (possessing altered stamps with intent to defraud).[2] But even if the warrant did in fact contemplate only an arrest for violation of Section 154, we submit that a search incidental to

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[2] Since the burden of proof was upon respondent to establish the illegality of the search and seizure (cf. *Nardone* v. *United States*, 308 U.S. 338), deficiencies in the record may properly be resolved against him.

such an arrest might properly embrace the complete stock of stamps. For in a criminal enterprise such as respondent's, his stock in trade was in a real sense the instrumentality of that crime. This is analogous to the situation in *Agnello* v. *United States, supra,* where, as incident to an arrest on a charge of selling narcotics illegally, it appears that a search was made for other packages of narcotics at the place where the arrest occurred. The legality of that search was sustained by the Court, which thus tacitly considered those objects in the category of "things connected with the crime * * * as the means by which it was committed" (269 U. S. at 30).

Although it condemned the search and seizure, the court below recognized (R. 228) that they involved less interference with privacy than those which were approved by this Court in the *Harris* case. For one thing, the latter involved the search of a four-room apartment (331 U. S. at 152), in contrast to the one-room office which respondent occupied. Moreover, in *Harris,* a private dwelling was the scene of the search, while here it was a place of business. And there is some support in opinions of this Court (*Davis* v. *United States,* 328 U. S. 582, 593; *Harris* v. *United States, supra,* at 151, n. 15) for the observation in Judge Clark's dissenting opinion below (R. 230) that "while search of a man's home is a serious infringement of personal liberties, I do not think a like view should

be taken of a man's place of business where acts of crime have already been found to have been committed." Another point of contrast involves the duration of the search, which lasted not more than an hour and a half in this case (R. 76), whereas the search in *Harris* extended over a period of five hours (331 U. S. at 149). The latitude of the search was justified here, no less than in *Harris*, by the fact that the objects of the search, the altered stamps, were readily concealable. In both cases the searches were no more than commensurate with their purposes.

There is no intimation in the record that the agents conducted their search otherwise than in good faith, for the purpose of discovering altered postage stamps. They did not resort to a minute combing of the premises for merely evidentiary materials which might have tended to connect the accused with some crime. Concededly, such conduct, as the Court recognized in *Harris, supra*, at 153, would have been subject to condemnation as a general exploratory search. The presence of the stamp experts strengthens the foregoing inference as to the purpose of the search. And, of course, the fact that the officers entered the premises intending and prepared to make an efficient search should not condemn it, for if the agents were empowered to search for other stamps which might be used in the illicit enterprise, it was proper to conduct the search in an efficient manner.

If, as we contend, the search was valid, we believe there can be no serious question of the propriety of the seizure,[3] for "If, in the course of a valid search, materials are uncovered, the very possession or concealment of which is a crime, they may be seized * * *" *Zap* v. *United States*, 328 U. S. 624, at 632 (dissent); and see *Steele* v. *United States (No. 1)*, 267 U. S. 498, and other cases collected in our brief in the *Harris* case, No. 34, Oct. Term, 1946, pp. 83-90. In the *Harris* case the Court held that the draft cards, which were Government property, were properly seized because the crime of possessing them was committed in the officers' presence. That principle is no less applicable here, since possession of the altered stamps was a crime under Section 151 of the Criminal Code. Indeed, spurious stamps are perhaps an object of greater interest on the part of law enforcement officers since they are inherently vicious and, by their transfer, may be the subject of future crimes. Moreover, the forged stamps were closely connected with the crime for which respondent was arrested, even on the assumption that the warrant of arrest was limited to the illegal sale of the four stamps. In this important respect, the seizure here makes a stronger appeal for judicial sanction than the seizure of the draft cards in the *Harris* case, which

[3] In addition to the stamps, check books and check stubs were seized, but were presumably returned to respondent since they were not adverted to in the motions to suppress.

were completely unrelated to the crimes for which the accused was arrested (331 U. S. at 154).

II

The Principle of *Harris* v. *United States* Should Be Followed

Although the majority below conceded that if *Harris* had been this Court's "last utterance" on the subject they would have "unhesitatingly held the seizure valid" (R. 228), they declined to follow that decision because of their interpretation of the reach of *Trupiano* v. *United States*, 334 U. S. 699. Judge Clark in his dissenting opinion stated that reversal of the conviction "requires us to do what the Supreme Court has so far carefully refrained from doing, namely, to overrule" the *Harris* decision (R. 228-230). And certainly this Court has not purported to overrule *Harris*. On the contrary, it disclaimed any such intention when it stated in *Trupiano* (at p. 708): "We do not take occasion here to reexamine the situation involved in *Harris* v. *United States, supra.*" The factual differences between the two cases were considered sufficiently pertinent to justify the Court in confining itself in *Trupiano* "to the precise facts" of that case (334 U. S. at 709). Nor was *Harris* extinguished as an authority by the decisions in *United States* v. *Di Re*, 332 U. S. 581; *Johnson* v. *United States*, 333 U. S. 10; or *McDonald* v. *United States*, 335 U. S. 451. In those cases the arrests were thought to be illegal by

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a majority of the Court, and, of course, a search and seizure incident to an arrest could not be premised upon an invalid arrest. But that is certainly not this case, for, as we have shown, respondent was arrested at his place of business in the proper execution of a warrant of arrest.

Just as there were factual differences between *Trupiano* and *Harris* which were thought to justify differences in result so, we maintain, are there equally cogent differences between *Trupiano* and the instant case which render the *Trupiano* principle inapplicable here. The *Trupiano* decision was confined "to the seizure of contraband the existence and precise nature and location of which the law enforcement officers were aware long before making the lawful arrest" (334 U. S. at 708). In the present case the officers had no such exact knowledge. In *Trupiano* the agents knew "every detail of the construction and operation of the illegal distillery" weeks before the raid (334 U. S. at 706). Here, although the agents probably anticipated that they would find altered stamps like the ones purchased by Skulnick, they could not have described them with specificity or stated their location with precision. It was necessary, in fact, for two experts in the detection of stamp alteration to accompany the officers for the purpose of inspecting the stamps and making a tentative selection of those which might be spurious.

Although the agents in *Trupiano* had access to "information which could easily have formed the

basis for a detailed and effective search warrant" (334 U. S. at 706), it is doubtful that the evidence which was available to the agents in this case afforded adequate basis for a warrant, which "'must describe with particularity the place to be searched and the things to be seized.'" *Trupiano* v. *United States*, 334 U. S. at 710.[4] And in the absence of a greater degree of particularity and precision than was possible here, if a warrant had issued to search respondent's office generally for all canceled stamps bearing overprints, which, as the majority below stated (R. 229), would have "opened the premises to as free a search as the officers in fact made," there would have been slight protection indeed of any rights of privacy for the assurance of which warrants are said to be necessary. Still another factual difference between *Trupiano* and the present case should be noted. In *Trupiano* the property was bulky and not of a type that could have been dismantled and removed before procurement of a warrant (334 U. S. at 706). The stamps involved here, on the other hand, could easily have been removed the very moment respondent suspected that the authorities were after him.

In short, there are present here substantially the same points of distinction which existed between *Harris* and *Trupiano* and which were held to warrant different conclusions in the two cases. In our

[4] See also, 18 U.S.C. (1940 ed.) 613, in effect at the time of the search here, and Rule 41(c), F.R. Crim. P.; but cf. *Steele* v. *United States (No. 1)*, 267 U.S. 498.

view, therefore, the court below mistakenly held that *Trupiano* compels the conclusion that the search and seizure here were illegal. Obviously, however, the statement in *Trupiano* (334 U. S. at 709) that the Court "was leaving it to another day to test the *Harris* situation by the rule that search warrants are to be obtained and used wherever reasonably practicable" lends itself to the construction adopted by the court below (R. 228) that even in a search of premises incident to a lawful arrest upon a warrant, officers must apply for and obtain a search warrant unless the objects are likely to be put beyond reach during the time necessary to get the warrant. In view of the uncertainty created by the reservation in *Trupiano*, we urge the Court to reaffirm the traditional and well-established principle that in a search of the kind here involved, incident, as it was, to a lawful arrest for a crime involving possession of contraband, the arresting officers may, without additional judicial authorization, search the premises where the arrest takes place for instrumentalities of the crime and for other property of like nature, the possession of which is a crime. *Harris* v. *United States*, 331 U. S. at 154. To the extent that the *Trupiano* decision may be thought to support a contrary result it should be explicitly disapproved. We think that the views expressed in the Chief Justice's dissenting opinion are sound and, upon reconsideration, should be adopted. The majority view seems inconsistent with the trend of prior decisions.

Although the scope of the search and seizure incident to respondent's arrest [5] was no greater than it would have been under a search warrant, this does not mean that the officers were confined in their incidental search to objects about which they had sufficiently detailed information upon which to have obtained a warrant in advance of the search. The right to make a search incident to a lawful arrest stands on a different footing from the right to make a search under a warrant, and, therefore, the opportunity or lack of opportunity to get a search warrant is immaterial. The *Lefkowitz* case, *supra*, 285 U. S. at 464-465, interdicted the use of seized documents "* * * which could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were." But that statement meant only that a search incident to an arrest cannot be stretched into a general exploration for evidentiary matter which might be used to connect the accused with some crime. For, given a similar purpose, a search warrant would not be available. Cf. *Gouled* v. *United States*, 255 U. S. 298, 309. It has never been thought, however, that in a search incident to an arrest, whether of the person or the premises, "the officers are to be confined to looking for

[5] The greater latitude which has been allowed in respect of searches and seizures contingent upon an arrest for a crime actually being committed in the arresting officers' presence (*Marron* v. *United States*, 275 U.S. 192) may still have some force. E.g., *United States* v. *Feldman*, 104 F. 2d 255 (C.A. 3).

what they already know about" (dissenting opinion below, R. 230). Here, using the criterion of the hypothetical search warrant as a measuring device —that is, if the search were not one incident to a lawful arrest—a warrant to search for and seize the altered stamps at respondent's place of business might well have issued. Accordingly, the search in this case properly extended to those objects.

An accommodation of the interest in privacy with the interest in efficient law enforcement militates against the requirement of a search warrant as an additional condition precedent to a search of the kind here involved. The entry here followed a showing of probable cause sufficient for a warrant of arrest, and the search was confined to premises within the immediate control of the person arrested, was limited to the particular time when he was arrested, and covered objects which could have been used to the injury of the public. These circumstances distinguish the search from a general search for evidence on the basis of mere suspicion, the type of search which the Fourth Amendment was designed to prevent. As Chief Justice Vinson stated in his dissenting opinion in the *Trupiano* case (334 U. S. at 714-715):

> The validity of a search and seizure as incident to a lawful arrest has been based upon a recognition by this Court that where law-enforcement agents have lawfully gained entrance into premises and have executed a valid arrest of the occupant, the vital rights of

> privacy protected by the Fourth Amendment are not denied by seizure of contraband materials and instrumentalities of crime in open view or such as may be brought to light by a reasonable search. * * * To insist upon the use of a search warrant in situations where the issuance of such a warrant can contribute nothing to the preservation of the rights which the Fourth Amendment was intended to protect, serves only to open an avenue of escape for those guilty of crime and to menace the effective operation of government which is an essential precondition to the existence of all civil liberties.

The warrant of arrest, which was issued by a commissioner entrusted with judicial functions and who passed upon the desires of the officers before they violated respondent's privacy, justified the entry. In contradistinction to the situation involved in *McDonald* v. *United States*, *supra*, we would be "dealing with formalities" (to use Mr. Justice Douglas' phrase, 335 U. S. at 455) if we superimpose the requirement of a search warrant in a situation such as this, where judicial authorization has already intervened. As Judge Clark pointed out in his dissenting opinion below (R. 230):

> * * * Since a warrant had been obtained for the arrest of the accused, it is thought that he has had all the benefit which an *ex parte* action by, usually, a minor federal official, a United States commissioner, can afford. The

> formality of signing an additional legal document, a warrant for search, will not add more of deliberation or concern for individual rights to the police activity. * * *

As we have seen, *supra*, pp. 5-6, the agents were thorough in their preliminary investigation of respondent's activities. In effect, the subsequent search was held illegal because of the time and study which they put on the case before they arrested respondent. If, instead of seeking assurances that respondent was carrying on a criminal enterprise, the agents had arrested him as soon as he had sold the four forged stamps, presumably an immediate search of the premises would not have been open to serious question. *Agnello* v. *United States, supra.* The net effect of the decision below, therefore, is that one who is arrested after his guilt is more probable is given greater rights than one who is arrested on the spur of the moment. Or, as Judge Clark pointed out, the decision means "simply that no search without a warrant of even a business office can ever be made unless the arrest can also be made without a warrant. Since the pressure of public opinion compels police officers to secure convictions, at least of the obviously guilty, the practical answer will be to arrange for such arrests and such searches only, resulting in rather less than more protection of the individual in the long run" (R. 230).

Judicial concern, we submit, should be directed to confining searches incident to lawful arrests to boundaries which will truly reflect their *incidental* character. If that is done, we believe that a requirement that a search warrant also be procured would be a useless formality.

CONCLUSION

The scope of the search and seizure in this case was less extensive than that approved in *Harris* v. *United States.* The principle announced in *Trupiano* v. *United States* that search warrants are to be obtained and used whenever reasonably practicable is inapplicable to searches such as the one in the instant case, which was incidental to a valid arrest and did not exceed traditional limits. To the extent that the *Trupiano* decision may be thought to be inconsistent with the *Harris* case, the former should be explicitly disapproved.

Accordingly, we respectfully submit that the judgment below should be reversed as to both counts.

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